U.S. Department of Labor

Office of Administrative Law Judges
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Date: September 8, 2000

Case No: 1999-LHC-2601

OWCP No: 06-167592

In the Matter of:

RONALD BADON,
Claimant,

vs.

INGALLS SHIPBUILDING, INC.,
Employer.

APPEARANCES:

MICHAEL G. HUEY, ESQ.
On behalf of the Claimant

PAUL M. FRANKE, Jr., ESQ.
On behalf of the Employer

Before: LARRY W. PRICE
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by Ronald Badon (Claimant) against Ingalls Shipbuilding, Inc. (Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, a Notice of Hearing was issued scheduling a formal hearing in Mobile, Alabama, on March 24, 2000. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs.[1]

I. STIPULATIONS

During the course of the hearing the parties stipulated and I find as related to Case No. 1999-LHC-2601 (JE-1):

1. Jurisdiction of this claim is under the LHWCA, 33 U.S.C. §901 et seq.

2. Date of injury/accident: August 18, 1994.

3. The injury occurred within the course and scope of the employment.

4. An Employer/Employee relationship existed at the time of the accident.

5. Employer advised of the injury on August 19, 1994.

6. The Notice of Controversion (LS-207) was filed on September 26, 1995.

7. Date of Informal Conference: Though requested by Claimant, the District Director elected to refer the case for a formal hearing.

8. Average weekly wage at the time of the injury: Disputed.

9. Nature and extent of disability:

   a) Temporary Total Disability: 9/14/95 to 10/21/96 ($27,401.01), 11/01/96 to 12/01/96 ($2,102.55), 01/20/97 to 01/29/97 ($678.24), 03/04/98 to 02/21/99 ($27,077.62)
   b) Total Compensation Paid: 113.57 weeks at $474.77 = $54,259.42
   c) Medical benefits paid: $31,146.41
   d) Permanent Impairment: 12%.

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[1] References to the transcript and exhibits are as follows: Transcript - Tr. ___; Claimant's Exhibits - CX.___, p.___; Employer's Exhibits - EX. ___, p. ___; Joint Exhibits - JE. ___.

10. The date of maximum medical improvement: Disputed.

II. ISSUES

1. What is the nature and extent of Claimant's disability?

2. Is Claimant entitled to any permanent disability based on an alleged loss of wage earning capacity?

3. Average weekly wage.

4. Attorney's fees, interest, and all applicable assessments.

5. Employer's credit for compensation and wages paid.

III. STATEMENT OF THE CASE

Claimant's Testimony

Claimant has worked for Employer since July 7, 1987. He was initially hired as an electrician and had reached the specialist-B level when he was injured on August 18, 1994. The physical requirements of his electrician job included climbing stairs, lots of walking, some overhead wire pulling, stooping, squatting, bending and lifting up to 45 pounds. Claimant generally worked 40 hours a week prior to the August 18, 1994 injury (Monday-Friday, 8 hours a day). Claimant never worked on a Sunday. Overtime availability was determined by the supervisors. Overtime existed for a certain number of people and would be determined based on the type of work which was needed. (Tr. 15-22).

Claimant sustained his work-related injury when he stepped on a grating that was not properly secured. He reported the fall to his supervisor and continued to work for a little over a year. At that point he was removed from work by Dr. Holland. Claimant was transferred to Dr. Middleton for surgery which was performed on September 15, 1995. Dr. Middleton then sent Claimant to a work-hardening program but Claimant found it too difficult. Claimant attempted to return to Dr. Holland, however, he had moved so Claimant was treated by another orthopedic, Dr. West. Dr. West returned Claimant to work on October 22, 1996, with job restrictions against climbing and limitations on the amount of stooping and bending that Claimant could perform. Claimant attempted to return to ship work but could not work within his restrictions so he was moved to the Q Hut. Claimant was pulled from the Q Hut by Dr. Mangum. At that point, Claimant was taking six darvocets a day for pain. On February 22, 1999, Claimant was returned to work with physical restrictions which included limited climbing, no stooping, bending, crawling or lifting over 20 pounds. Two days after his return to work, Claimant was able to secure a transfer from

the Q Hut to the material coordinator job that he currently holds. (Tr. 26-36).

Claimant had previously worked in the Q Hut during the period following his surgery and prior to his return on February 22, 1999. His duties during that initial period in the Q Hut had involved the preparation of various sizes of cables. During the same period, Claimant performed some duties aboard vessels which involved the use of ladders. Claimant found that he was unable to work aboard vessels and was transferred to the Q Hut. Claimant never earned any overtime in the Q Hut because there was none available. (Tr. 22-26). Claimant continues to take medication while at work and at home. (Tr. 36-38).

During the year following the accident, Claimant continued to work the same number of hours as other craft members with the same seniority. (Tr. 41). Claimant acknowledged that it was not unusual for one craft to be hiring while another was downsizing. He had first been informed of the availability of the job he currently holds while at a football game with Mr. Roderick. Claimant agreed with Mr. Walker's assessment that he was enjoying his new job. Mr. Walker, a Department of Labor representative, had visited Claimant in his current job position and found on more than one occasion that Claimant was enjoying the new position. Claimant denied that he had been sent a letter informing him that he should speak with Supervisor Wilkey if he wanted to change jobs to one that might have more overtime. Though he claims not to have gotten the letter, he agreed that he had not communicated to anyone a desire to move to a different department. Since Claimant was injured he has received two raises which have increased his salary by $1.32/ hour. (Tr. 38-49).

On redirect, Claimant indicated that he had been pulled from the Q Hut because his back was hurting. He would not have the same problem if he were to return to that job since he now has permission to take his medication while at work. (Tr. 49-54).

Testimony of Barbara Melinda Wiley

Ms. Wiley is the senior employee relations representative for Employer. She originally met with Claimant on October 21, 1996. Claimant had been given restrictions by Dr. West which included no lifting over 50 pounds and no frequent lifting over 25 pounds. Claimant's ability to bend, stoop and twist were also restricted. He was returned to his normal job but with restrictions. In January, 1997, Dr. West added a restriction against climbing.

There was some difficulty with Claimant working in the shipyard while taking strong narcotic medication but that has been resolved. He is the only employee who is allowed to work in the shipyard while taking those types of medication. Ms. Wiley testified that Claimant's position as a material handler is a traditional job which has always been integral to the ship building process. It is a job that many workers would like to have because it is sedentary and the worker is generally in the air conditioning. (Tr. 57-62).

Ms. Wiley testified that the conditions at the shipyard have changed radically since Claimant

switched jobs. While he was an electrician, there were four to six vessels being built and everyone was working some overtime. Since Claimant has changed jobs there is only one vessel which is available for electricians to work on. Therefore, electricians are not getting any overtime. Overtime

is not guaranteed, rather it is rotated amongst the union members so as to share it as evenly as possible. Ms. Wiley testified that her understanding of the production schedule for the vessel currently under construction would call for Claimant's current job to receive some overtime. It is not guaranteed but it is possible. (Tr. 62-75).

IV. DISCUSSION

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, weigh the evidence, draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 666 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 928 (1968). It has been consistently held the Act must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. Britton, 377 F.2d 144 (D.C. Cir. 1967).

However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 114 S.Ct 2251 (1994), aff'g, 9990 F.2d 730 (3rd Cir. 1993).

AVERAGE WEEKLY WAGE

Section 10 sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by fifty-two, pursuant to Section 10(d), to arrive at an average weekly wage. 33 U.S.C. § 910(d)(1). The computation methods are directed toward establishing a claimant's earning power at the time of the injury. Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137 (1990).

Sections 10(a) and 10(b) are relevant to the determination of an employee's average annual wages where an injured employee's work was regular and continuous. Duncanson-Harrelson Co. v. Director, OWCP, 686 F.2d 1336 (9th Cir. 1982). Section 10(a) applies if the employee worked in the employment whether for the same or another employer, during substantially the whole of the year immediately preceding the injury. 33 U.S.C. § 910(a). Section 10(b) is another method of calculating average annual earnings

when an employee worked in permanent or continuous employment, but did not work for substantially the whole of the year prior to his injury. 33 U.S.C. § 910(b); Empire United Stevedores v. Gatlin, 936 F.2d 819, 25 BRBS 26 (CRT)(5th Cir. 1991). There appears to be no dispute but that Claimant worked the entire year prior to his injury and that Section 10(a) is the appropriate method to calculate Claimant's average weekly wage. As such, I find that under the circumstances Claimant's average weekly wage would most fairly and reasonably be determined under section 10(a) of the Act, as Claimant worked substantially the whole of the 52 weeks preceding his August 18, 1994 injury.

Section 10(a) computes an average weekly wage based on a claimant's actual employment history. Hall v. Consolidated Employment Systems, Inc., 139 F.3d 1025, 1030 (5th Cir. 1998). To do this Claimant's gross earnings for the preceding 52 weeks are divided by the actual number of days that he worked. The resulting figure is Claimant's average daily wage which is multiplied by 300 for a six-day worker or 260 for a five-day worker. That number is then divided by 52 to produce Claimant's average weekly wage.

I find that Claimant has correctly calculated the actual number of days worked in the preceding 52 week and has correctly applied the formula stated in Section 10(a) of the Act. Therefore, Claimant's pre-injury average daily wage is determined by dividing $39,537.74 by 246 days resulting in an average daily wage of $160.72. Since Claimant was a five day worker, his average daily wage is multiplied by 260 days for a total of $41,787.20. This total is divided by 52 to produce a pre-injury average weekly wage of $803.60.[2]

NATURE AND EXTENT

Having established work-related injuries, the burden rests with the Claimant to prove the nature and extent of his disability, if any, from those injuries. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1985). A Claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement(MMI). James v. Pate Stevedoring Co., 22 BRBS 271, 274(1989); Trask, at 60. Any disability before reaching MMI would thus be temporary in nature. The date of MMI is a question of fact based upon the medical evidence of record. Ballestros v. Willamette Western Corp., 20 BRBS 184 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979). An employee reaches MMI when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395 (1981).

The parties are in agreement that Claimant has reached MMI but are not in agreement as to the

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[2] While Employer apparently attempted to use Section 10(a) to calculate Claimant's average weekly wage, Employer failed to follow the formula outlined in Section 10(a). I also note that Employer used the same gross earning in its calculations, including overtime paid during the previous twelve months. (Brief at 11). As overtime was a regular and normal part of Claimant's employment during the previous 52 weeks, I find it was appropriate to include these wages in the calculations.

date MMI was reached. Claimant advocates that he reached MMI in 1996 while Employer contends that it occurred in 1998. The medical records in this case demonstrate that Claimant underwent surgery which was followed by several unsuccessful attempts to return to work. Dr. Holland's progress note of April 2, 1996, indicates that Claimant had reached MMI. (EX. 6, p. 1). Dr. West's letter of April 26, 1996, and his October 1, 1996 chart note indicate that Claimant had reached MMI. (EX.6, p. 3). Employer counters that Dr. Magnum did not return Claimant to work

until May 11, 1998. The medical evidence does contain several instances where Claimant experienced flair-ups in his back. These often coincided with either excessive lifting or a lack of pain medication. Claimant's condition appears to have stabilized in April, 1996. Treatment since that date has focused on keeping Claimant's chronic pain at a tolerable level. Therefore, I find that the medical evidence best supports a finding that Claimant reached MMI on April 2, 1996.

The question of extent of disability is an economic as well as medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940). Disability under the LHWCA means an incapacity, as a result of injury, to earn wages which the employee was receiving at the time of the injury at the same or any other employment. 33 U.S.C. §902(10). In order for Claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Economic disability includes both current economic harm and the potential economic harm resulting from the potential result of a present injury on market opportunities in the future. Metropolitan Stevedore Co. v. Rambo (Rambo II), 117 S.Ct. 1953, 1955 (1997). A Claimant will be found to have either no loss of wage-earning capacity, no present loss but a reasonable expectation of future loss (de minimis), a total loss, or a partial loss.

A Claimant who shows he is unable to return to his former employment has established a prima facie case for total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. P & M Crane v. Hayes, 930 F.2d 424, 430 (5th Cir. 1991); New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Furthermore, a Claimant who establishes an inability to return to his usual employment is entitled to an award of total compensation until the date on which Employer demonstrates the availability of suitable alternative employment. Rinaldi v. General Dynamics Corps., 25 BRBS 128 (1991).

In the present case, the parties are in agreement that Claimant has sustained a 12% permanent physical disability. They are also in agreement that Claimant was unable to return to full employment until February 22, 1999. Prior to that point, Claimant attempted to work several times but was unable to return to his usual employment. Therefore, Claimant has established a prima facie case of total disability. Employer's post-hearing brief acknowledges that Claimant should be considered totally disabled until his return to work on February 22, 1999. (Employer's Brief, p. 6). I find no reason to upset this

acknowledgment.

The issue to be decided is the extent of Claimant's disability since his return to work on February 22, 1999. While Claimant is now earning more per hour than when he was injured, Claimant contends that his loss of overtime should be included in the determination of his loss of wage earning capacity. Employer counters that the loss of overtime should not be considered in determining the extent of Claimant's disability. When overtime hours are a regular and normal part of a claimant's employment, they should be considered in determining a claimant's average weekly wage. Bury v. Joseph Smith and Sons, 13 BRBS 694, 698 (1981). As discussed previously, I find that overtime hours were a regular and normal part of Claimant's employment and included those wages in determining Claimant's average weekly wage.

Loss of overtime is also a factor in determining a claimant's loss of wage earning capacity if overtime was included in a claimant's average weekly wage. Peele v. Newport News Shipbuilding & Dry Dock Co., 20 BRBS 133, 137 n.3 (1987). Butler v. Washington Metropolitan Area Transit Authority, 14 BRBS 321, 323 n. 4 (1981). The focus is on claimant's loss of previously available overtime due to his injury and not on a claimant's ability to show that overtime was available in his pre-injury employment after his injury. Brown v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 110, 112 (1989).

In some instances it may be inappropriate to include overtime in determining a claimant's average weekly wage and post injury wage earning capacity. In Sears v. Newport News Shipbuilding & Dry Dock Co., 19 BRBS 235 (1987), the claimant worked a decreasing number of overtime hours in the years preceding his injury and the employer presented evidence that other employees who worked with the claimant had no overtime available to them within several months after the claimant's injury. If that is the situation, a claimant's injury would not be the cause of the loss in overtime hours so it would not be a factor in determining a loss of wage earning capacity.

In the present case, Employer contends that Claimant has not suffered a loss of wage earning capacity. Ms. Wiley testified that changing work conditions rather than Claimant's injury were the cause of his loss of overtime hours. At the time of Claimant's injury, the shipyard had sufficient work to mandate the need for overtime work. Since that time, the shipyard has sustained a reduction in the number of vessels which are being constructed. Employer argues that this should be sufficient evidence for this Court to follow the holding in Sears.

I find that the instant case is governed by the holding in Sears. Claimant's wage records and testimony support Ms. Wiley's testimony that shipyard work was declining and that electricians were not working overtime. I note that prior to October, 1993, Claimant rarely worked overtime. However, starting in October, 1993, and continuing until July 19, 1994, Claimant worked overtime almost every week. However, after July 19, 1994, Claimant again rarely worked overtime for the rest of 1994. (CX. 2, pp. 5-6). Claimant testified that during the year following the accident he continued to work the same number of hours as other craft members with the same seniority. This would certainly indicate that it was the change in the availability of overtime as opposed to Claimant's injury that caused him to no longer work overtime.

I note that it was almost four weeks prior to Claimant's injury that his overtime hours were drastically reduced.

Accordingly, I find that the evidence fails to establish that overtime work would be available to Claimant if he had not been injured. I find that changing work conditions rather than Claimant's injury were the cause of his loss of overtime hours. Because Claimant is now earning substantially more than at the time of his injury, he has suffered no loss of wage earning capacity.

ORDER

It is hereby ORDERED, JUDGED AND DECREED that:

1) Employer shall pay to Claimant temporary total disability from September 14, 1995, until April 1, 1996, based on an average weekly wage of $803.60.

2) Employer shall pay to Claimant permanent total disability from April 2, 1996, until October 21, 1996; from November 1, 1996, until December 1, 1996; from January 20, 1997, until January 29, 1997; and from March 4, 1998, until February 21, 1999, based upon an average weekly wage of $803.60.

3) Employer is entitled to a Section 14(j) credit for any wages or compensation paid prior to this award.

4) Employer shall pay all interest due on unpaid compensation as calculated by the District Director.

5) Counsel for Claimant, within 30 days of receipt of this Order, shall submit a fully-documented fee application, a copy of which shall be sent to all opposing counsel who shall have 20 days to respond with objections thereto.

SO ORDERED.

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LARRY W. PRICE
Administrative Law Judge